

LAW ENFORCEMENT OFFICERS' AND FIRE FIGHTERS' PLAN 2 RETIREMENT BOARD

Catastrophic Disability Initial Consideration

July 27, 2005

1. Issue

The total disability provision in the Board's duty disability bill was removed by the Legislature because of questions about how the benefit would work in conjunction with benefits available to LEOFF Plan 2 members through Worker's Compensation and about certain aspects of eligibility for the total disability benefit. The Board requested that additional information be provided in follow up to the questions raised by the legislature.

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3. Members Impacted

All of the 14,560 active members of LEOFF Plan 2, as well as future active members would be affected by this issue. For purposes of Senate Bill 5615 in 2005 the Office of the State Actuary estimated that approximately 11 members would have duty-related total disabilities during the first year the benefit is available. However, exact historical disability information for LEOFF Plan 2 is not available.

4. Current Situation

A LEOFF Plan 2 member who becomes totally incapacitated for continued employment in a LEOFF position is eligible to receive a disability retirement benefit. Disabled LEOFF Plan 2 members are entitled to receive a minimum retirement allowance equal to ten percent of such member's final average salary. The member additionally receives a retirement allowance equal to two percent of the member's average final salary for each year of service beyond five years.

Members who are catastrophically disabled and incapable of substantial future employment in any capacity receive the same benefits as members who may be capable of substantial and gainful non-LEOFF employment.

5. Background Information

An injury on the job can result in a member's inability to work, creating serious financial problems for the individual and his or her family. The costs of necessary medical treatment can exacerbate these financial problems. Although health insurance plans may help to pay for medical care costs, disability benefits are relied upon to replace a catastrophically disabled worker's lost income. Disability benefits may be available from federal programs, state and local programs, or private sources. Typically, disability programs pay benefits ranging from 60 to 100 percent of a person's pre-disability monthly pay.

2005 LEOFF Duty Disability Legislation

The LEOFF Plan 2 Retirement Board recommended a duty disability bill (SB 5615) to the 2005 Legislature. The bill had two components including an occupational disability provision and a total disability provision. While the bill passed, the total disability provision was removed from the bill by the Legislature because of questions about how the benefit would work in conjunction with the benefits available to LEOFF Plan 2 members through Worker's Compensation and about certain aspects of eligibility for the total disability benefit.

The 2005 total disability provision would have created a 70% benefit in the case of total disability to cover those law enforcement officers and fire fighters who suffer the type of catastrophic injury that leaves them unable to pursue any financially significant employment for the rest of their lives. In order to define "financially significant employment", the disability provision mirrored the stringent "substantial gainful activity" standard set by Social Security for determining total disability eligibility.

Total Disability Language in Senate Bill 5615 (2005)

A member who is totally disabled in the line of duty is entitled to receive a retirement allowance equal to seventy percent of such member's final average salary. A member shall be considered totally disabled if he or she is unable to perform any substantial gainful activity due to a physical or mental condition that may be expected to result in death or that has lasted or is expected to last at least twelve months. Substantial gainful activity is defined as average earnings of no more than eight hundred ten dollars a month in 2004 adjusted annually for inflation as determined by the director.

Benefit Integration

During the 2005 Legislative Session, Legislators asked if the LEOFF total disability provision would offset Workers' Compensation from Labor and Industries, which it did not. The concern expressed was that a person might receive 60 to 75 percent of pre-disability salary from Workers' Compensation and then an additional 70 percent of final average salary in pension, creating a windfall from state sources for the same injury.

Offsets

A benefit integration policy can be developed to determine what constitutes a fair income replacement level when workers receive benefits from multiple sources for the same work-related condition. When considering what benefit levels to provide through a disability program, duplication can be managed by recognizing other sources of disability benefits. One of the most commonly used tool for integrating benefits is offsets.

A benefit offset simply means that one or more of the disability programs will deduct from the payment it would make, some or all of the payment from other disability programs. Another form of offset uses a benefit ceiling or maximum. Some programs set a maximum amount of combined benefits that can be received and paying the difference, if any, between the cumulative benefits and the maximum. The maximum can be established as a percentage of pre-disability earnings or may just be a set amount.

In government programs, offsets have been applied primarily to ensure that an individual does not receive a “windfall” of benefits from multiple government sources for the same injury.

Generally speaking, most disability programs have provisions which coordinate paying benefits through some form of offset for Workers’ Compensation, Social Security, other federal programs, and employer provided pension/disability plans. Some programs also take into account any wages or salary earned from working or payments received from private disability insurance.

Workers’ Compensation Disability

Generally speaking, a total disability benefit from Workers’ Compensation will pay 60 to 75 percent of pre-disability salary. The Workers’ Compensation benefits are not offset for pension payments from Washington State or any other state. In Washington State, Workers’ Compensation benefits are offset by Social Security rather than Social Security being offset by Workers’ Compensation. The offset used is derived from the federal law and applies the 80 percent of average current earnings test to calculate the amount of offset. See Appendix A for additional information regarding Workers’ Compensation disability benefits.

Social Security Disability

The average monthly disability benefit from Social Security in 2004 was \$968. Unless otherwise provided in state statute (as it is in Washington), Social Security offsets payments from Workers’ Compensation and certain payments from federal, state, or local disability programs. Under the federal law, the combined total of benefits cannot exceed eighty percent of a person’s average current earnings prior to becoming retired.

Public disability payments that are not job related are included in the offset. However, duty related disability payments, such as from state pensions, are not included as part of the offset.

Public Safety Officers' Disability Benefit

An example of federal benefit, other than Social Security, that could be considered in an offset is the Public Safety Officers' Benefit (PSOB) for disability. Unlike Social Security, all members of LEOFF Plan 2 could qualify for PSOB benefits from a duty related disability. The PSOB disability benefit provides a lump sum payment of \$275,658, which is only offset by lump sum settlement awards from Workers' Compensation. See Appendix B for additional information regarding PSOB disability benefits.

Fish and Wildlife Officers' Compensation Insurance

An example of other benefits that may be provided by an employer is the Fish and Wildlife Enforcement Officers disability benefit provided by the Department of Fish and Wildlife. A disability benefit of 50 percent of salary is provided officers who are injured on the job and unable to work. This benefit is paid by the Department of Fish and Wildlife, independent from state pension and Workers' Compensation payments for LEOFF Plan 2 members. However, for PERS Plan 1 members, the benefit is offset for any PERS Plan 1 duty disability retirement payments and Workers' Compensation payments.

RCW 77.12.264

The director shall relieve from active duty fish and wildlife officers who are injured in the performance of their official duties to such an extent as to be incapable of active service. While relieved from active duty, the employees shall receive one-half of their salary less any compensation received through the provisions of RCW 41.40.200, 41.40.220, and 77.12.262.

Benefit Eligibility

The intent of the Board's 2005 total disability proposal was to mirror the standard set by Social Security for qualifying to receive, and continuing to receive disability benefits.

The Social Security definition of disability is a stringent standard based on a person's ability, or inability to work. A person is only considered disabled under Social Security rules if they cannot do work that they did before and if the Social Security Administration (SSA) decides that the person cannot adjust to other work because of their medical condition(s). The SSA defines disability as "the inability to engage in any substantial gainful activity (SGA) by reason of any medically determinable physical or mental impairment(s) which can be expected to result in death or which has lasted or can be expected to last for a continuous period of no less than twelve months."

To receive disability benefits under this definition, a person must not be able to engage in any substantial gainful activity (SGA). The issue of defining "substantial gainful activity" for federal Social Security disability benefits is dealt with by an earnings test.

If a person is working in 2005 and their earnings average more than \$830¹ a month, they cannot be considered disabled and benefits would cease. See Appendix C for additional information on Social Security disability benefits

The definition of disability also contains an expectation that the injury will last for at least twelve months. The expectation generated questions regarding when a person could receive benefits. The expectation does not mean a person must wait for twelve months before being allowed to receive disability benefits. A person who otherwise meets the disability criteria is entitled to begin receiving benefits up front. However, if a person is found to no longer have a disabling impairment during the twelve month period due either to earnings above the SGA level or medical improvement, the disability benefits would cease. Disability benefits also cease when the person dies, unless they selected a survivor option.

Although there are a variety of standards used for determining disability eligibility, the standard used by SSA is generally considered to be very stringent for disability benefits. See Appendix D for information on other disability standards.

6. Supporting Information

Appendix A: Workers' Compensation

Appendix B: Public Safety Officers' Disability

Appendix C: Social Security Disability

Appendix D: Other Disability Standards

¹ The permissible earnings amount is adjusted annually for inflation. The permissible earnings amount for Social Security and the Board's proposal was \$810 in 2004.

Appendix A – Workers' Compensation

Labor and Industries

The primary goal of Labor and Industries is to make workplaces safer and prevent injuries and occupational disease. When a workplace injury or illness does occur, the focus shifts to minimizing the financial impact — on the worker, and on his or her employer. That means first ensuring that the claim is legitimate, and then making sure proper and timely decisions are provided giving the worker the best chance for recovery and an early return to work.

Total Permanent Disabilities

If an accident results in the loss or total paralysis of both legs or arms, one leg and one arm, or a total loss of eyesight, a person is eligible for a pension by law, even if able to return to work.

If vocational and medical evaluations determine that the injury prevents the person from ever becoming gainfully employed, the person may be paid a monthly pension for life. However, this type of "non-statutory" pension may not be payable if the person is able to return to work.

Pension benefits are paid monthly. They are based on the amount of time-loss compensation to which the person is entitled. As with time-loss compensation benefits, the exact amount the person is eligible to receive depends on factors such as wages, marital status, number of dependents, health care benefits, Social Security benefits and the state's average wage at the time of injury. In some cases, the pension benefit amount may be reduced for previously paid permanent partial disability awards.

The amount of benefits is 60 to 75 percent of total wages and certain benefits, depending on marital status and number of dependents at the time of injury. These benefits cannot exceed specified limits based on a percentage of the state's average wage. (The state's average wage varies; it is established by the Department of Employment Security on July 1 of each year.) These benefits are based on a standard formula established by law.

Establishing gross income

The following is taken into account to establish gross income at the time of injury:*

- Wages earned before taxes, including income from a second job.
- Medical, dental and vision benefits.
- The reasonable value of room and board, housing, fuel or similar considerations received from an employer as part of income.
- Any bonus received as a part of the contract of hire with the employer at the time of injury.
- Tips reported to the employer for federal income tax purposes.

If a person's work is exclusively seasonal, essentially part-time or intermittent, monthly wage is determined by averaging the total wages earned, including overtime pay and tips, from all employment in any 12 successive calendar months preceding the injury that most fairly represents your employment pattern.

* If a person has an occupational disease, gross income is based on the date the person was last exposed, first required medical treatment or became disabled, whichever came first.

Possible effects on Social Security benefits

A person should report to any Social Security payments received. In some cases, both time-loss compensation and Social Security disability or retirement benefits may be received. However, if the combined benefits total more than the maximum amount allowed under a formula contained in the federal Social Security law, benefit payments will be reduced by the amount that exceeds the maximum. In no case will the combined benefit amount be reduced to less than the amount that would be received on disability alone.

Appendix B – Public Safety Officers' Disability

The Public Safety Officers' Benefits (PSOB) Disability Program, enacted on November 29, 1990, provides disability benefits to public safety officers who have been permanently and totally disabled by a catastrophic personal injury sustained in the line of duty if that injury permanently prevents the officer from performing any substantial and gainful work. Medical retirement for a line-of-duty disability does not, in and of itself, establish eligibility for PSOB benefits.

Eligibility

PSOB Disability Program beneficiaries must comply with the PSOB Office's administrative review process by producing sufficient evidence to show that the public safety officer suffered a permanent and total disability as the direct and proximate result of a catastrophic injury sustained in the line of duty.

Most public safety officers (federal, state, and local law enforcement officers, firefighters, and members of public rescue squads and ambulance crews) are covered for catastrophic personal injuries sustained on or after November 29, 1990. All line-of-duty injuries that result in a disability retirement are not necessarily covered under the Public Safety Officers' Disability Program. The injury has to prevent the public safety officer from performing any gainful work.

Gainful work means work activity that is both substantial and gainful.

- Substantial work activity means work activity that involves doing significant physical or mental activities. Work may be substantial even if it is done on a part-time basis or if the public safety officer does less, gets paid less, or has less responsibility than when he or she was a member of the former employing public safety agency.
- Gainful work activity means work activity that is done for pay or profit. Work activity is gainful if it is the kind of work usually done for pay or profit, whether or not a profit is realized or pay is received.

Applying for PSOB Disability Benefits

If mentally and physically able, the permanently and totally disabled public safety officer may file a claim directly with the PSOB Program Office. Otherwise, a legally appointed representative or the public agency where the permanently and totally disabled public safety officer was employed may file on the officer's behalf. The public safety officer must be medically retired from his or her employing agency for the line-of-duty injury he or she sustained, and the public safety officer must be receiving the maximum compensation for a permanent and total disability from his or her benefit provider. A benefit provider may be a retirement fund through the department or Workers' Compensation. Social Security does not count as a benefit provider.

The prerequisite disability certification (PDC) is the first process the public safety officer must satisfy before a claim is initiated. When the public safety officer or the officer's representative calls the PSOB Office to request an application, the PDC letter is sent if the officer's line-of-duty injury occurred on or after November 29, 1990. The letter describes exactly what the officer has to submit to meet PDC criteria.

If the public safety officer has met PDC criteria, a claim is initiated and the PSOB Office will request specific documentation to support the claim, including an investigation report and medical records. The public safety officer and his or her former agency also must complete the "Report of Public Safety Officer's Permanent and Total Disability" claim form. This form, in conjunction with the supporting documents, is used to determine the officer's eligibility. When the PSOB Office has received all the claimant's documentation, the medical records will be forwarded to its medical consultant. The consultant will review the claimant's records and submit a written report within 45 days to the PSOB Office identifying whether the claimant is permanently and totally disabled in accordance with the PSOB Act (42 U.S.C. 3796).

The PSOB Office will prepare a determination based on the medical consultant's findings and other requisite information. The determination is then sent to the Office of Justice Programs' Office of General Counsel for review and concurrence and to ensure that all legal requirements have been met.

Payment of Disability Benefits

The claimant is notified of the decision in writing. If the decision is favorable, a lump sum payment of \$275,658 will be made through the U.S. Department of the Treasury. The disability settlement will be offset for any award settlements from Workers' Compensation, but would not be offset for month pension payments from Workers' Compensation or state pension.

The payment will be made either by direct deposit or by check mailed directly to the claimant's home address (provided on the "Report of Public Safety Officer's Permanent and Total Disability" claim form) within 14 business days after the claimant's receipt of notification. If direct deposit is desired, banking information will be required. If the decision is unfavorable, the claimant will receive the grounds for that finding and have 30 days from receipt of notification to request an appeal of the decision and offer any new evidence or line of reasoning on the issues in controversy.

Appendix C – Social Security Disability

Program Description

The Social Security Administration (SSA) administers two programs that provide benefits based on disability: the Social Security disability insurance program (SSDI) (title II of the Social Security Act) and the supplemental security income (SSI) program (title XVI of the Act).

Title II provides for payment of disability benefits to individuals who are "insured" under the Act by virtue of their contributions to the Social Security trust fund through the Social Security tax on their earnings, as well as to certain disabled dependents of insured individuals. Title XVI provides for SSI payments to individuals (including children under age 18) who are disabled and have limited income and resources.

The Act and SSA's implementing regulations prescribe rules for deciding if an individual is "disabled." SSA's criteria for deciding if someone is disabled are not necessarily the same as the criteria applied in other Government and private disability programs.

Definition of Disability

For all individuals applying for disability benefits under title II, and for adults applying under title XVI, the definition of disability is the same. The law defines disability as the inability to engage in any substantial gainful activity (SGA) by reason of any medically determinable physical or mental impairment(s) which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.

SSA evaluates the work activity of individuals claiming or receiving disability benefits under SSDI. For the SSI program, only those individuals claiming benefits because of a disability are evaluated. Under both programs, SSA uses earnings guidelines to evaluate whether the work activity is SGA, and whether an individual is considered disabled under the law. While this is only one of the tests used to meet the definition of disability, it is the critical first step in the disability evaluation.

If the impairment is other than blindness, earnings averaging over \$830 a month (for the year 2005) generally demonstrate SGA. If blind, earnings averaging over \$1,380 a month (for the year 2005) generally demonstrate SGA. These amounts are established by law and are adjusted each year based on the national average wage.

Medically Determinable Impairment

A medically determinable physical or mental impairment is an impairment that results from anatomical, physiological, or psychological abnormalities which can be shown by medically acceptable clinical and laboratory diagnostic techniques. A physical or mental impairment must be established by medical evidence consisting of signs, symptoms, and laboratory findings-not only by the individual's statement of symptoms.

The Disability Determination Process

Most disability claims are initially processed through a network of local Social Security field offices and State agencies (usually called disability determination services, or DDSs). Subsequent appeals of unfavorable determinations may be decided in the DDSs or by administrative law judges in SSA's Office of Hearings and Appeals.

Social Security Field Offices

SSA representatives in the field offices usually obtain applications for disability benefits, either in person, by telephone, or by mail. The application and related forms ask for a description of the claimant's impairment(s), names, addresses, and telephone numbers of treatment sources, and other information that relates to the alleged disability. (The "claimant" is the person who is requesting disability benefits.) The field office is responsible for verifying nonmedical eligibility requirements, which may include age, employment, marital status, or Social Security coverage information. The field office sends the case to a DDS for evaluation of disability.

State Disability Determination Services (DDS)

The DDSs, which are fully funded by the Federal Government, are responsible for developing medical evidence and rendering the initial determination on whether the claimant is or is not disabled or blind under the law.

Usually, the DDS tries to obtain evidence from the claimant's own medical sources first. If that evidence is unavailable or insufficient to make a determination, the DDS will arrange for a consultative examination (CE) in order to obtain the additional information needed. The claimant's treating source is the preferred source for the CE; however, the DDS may also obtain the CE from an independent source.

After completing its initial development, the DDS makes the disability determination. The determination is made by a two-person adjudicative team consisting of a medical or psychological consultant (who is a physician or psychologist) and a disability examiner. If the adjudicative team finds that additional evidence is still needed, the consultant or examiner may recontact a medical source(s) and ask for supplemental information.

The DDS also makes a determination whether the claimant is a candidate for vocational rehabilitation (VR). If so, the DDS makes a referral to the State VR agency. After the DDS makes the disability determination, it returns the case to the field office for appropriate action depending on whether the claim is allowed or denied. If the DDS finds the claimant disabled, SSA will complete any outstanding non-disability development, compute the benefit amount, and begin paying benefits. If the claimant is found not disabled, the file is retained in the field office in case the claimant decides to appeal the determination.

If the claimant files an appeal of an initial unfavorable determination, the appeal is usually handled much the same as the initial claim, except that the disability determination is made by a different adjudicative team in the DDS than the one that handled the original case.

As described in the *Social Security 2005 Red Book*, the process used to decide disability involves five steps. They are:

1. Are you working?

If you are working and your average monthly earnings, after considering the affect of work incentives, are at the SGA level, we generally cannot consider you disabled. If your monthly earnings average less than the SGA level, we look at your medical condition.

2. Is your medical condition "severe"?

For us to consider you disabled, your impairment(s) must significantly limit your ability to do basic work activities, for example walking, sitting, seeing, and remembering. If it does not, we cannot consider you disabled. If it does, we go to the next step.

3. Is your medical condition in the list of disabling impairments?

We maintain a list of impairments for each of the major body systems that are so severe we automatically consider you disabled. If your medical condition(s) is not on the list, we have to decide if it is of equal severity to an impairment on the list. If it is, we approve your claim. If it is not, we go to the next step.

4. Can you do the work you did previously?

If your medical condition is severe, but not at the same or equal severity as an impairment on the list, then we must decide if you can do your past relevant work. If you can, we will deny your claim. If you cannot, we go to the next step.

5. Can you do any other type of work?

If you cannot do your past relevant work, we then see if you can do any other type of work. We consider your age, education, past work experience, and transferable skills. If you cannot do any other kind of work, we will approve your claim. If you can, we will deny your claim.

Appendix D – Other Disability Standards

There are several different sources from which catastrophic disability benefits may be provided including federal sources, state sources, local employer and private sources. Among these varying sources there are several different standards that are applied for determining benefits eligibility.

Substantial and Gainful Activity.

While each disability program typically defines what “substantial” and “gainful” mean, these terms are usually defined by some measure of the disabled person’s ability to be engaged in some level of work activity or achieve a set income level. The disability definition under both the Public Safety Officers’ Benefit (PSOB) program and Social Security use a “substantial and gainful activity” standard. The Social Security use of this standard for qualifying for disability and remaining under disability is considered one of the most stringent standards.

Activities of Daily Living.

To be considered disabled under this standard a person must lose two or more activities of daily living or become cognitively impaired. “Activities of Daily Living” are defined as bathing, dressing, toileting, transferring, continence, and eating.

Education, Training and Experience.

To be considered disabled under this standard a person must not be able to engage in any occupation or employment for which the person is qualified by reason of education, training, or experience. This standard is sometimes tempered with an allowance to be able to work but only if the person is unable to earn more than some set level of pre-disability income. Under some policies, rather than an earning level, continued disability eligibility is measured by the percentage of duties that a person can still perform pertinent to his or her profession or by the percentage a person is deemed by a board to be disabled.

Loss of Body Part.

To be considered disabled under this standard a person must sustain severe physical damage such as irrevocable loss of speech, hearing in both ears, the sight of both eyes or the use of one or both legs or arms, or paralysis.